Re Lim Chooi Sang; ex p Soon Fay Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D5-29-1665 OF 1997
STEVE SHIM J
16 OCTOBER 1998

Bankruptcy *— Creditor's petition — Service of — Whether agent was authorized under seal to present petition on behalf of creditor corporation — Whether petition presented by director of creditor was valid*

Bankruptcy *— Creditor's petition — Discrepancies in — Agent's signatures appearing on creditor's petition differ from signatures on affidavit of truth of statement and creditor's affidavit in reply to debtor's affidavit — Whether can be said that agent did present petition and depose affidavit of truth of statement — Whether creditor's petition was valid*

A creditor's petition was taken out against the appellant debtor ('the debtor') by the respondent creditor ('the creditor'), the latter of which is a corporation. The petition was presented by one Chong Che Chong ('the agent'), a director of the creditor, appointed to represent the latter by resolution of its board of directors. At the hearing of the petition, receiving and adjudication orders were granted against the debtor whereupon he applied to set them aside. The application was refused by the registrar and the debtor appealed to the judge in chambers.

The application to set aside was grounded on the contention that, contrary to the provisions in s 133(a) of the Bankruptcy Act 1967 and r 215 of the Bankruptcy Rules 1969 ('the Rules'), the agent was not authorized under seal to present the petition on behalf of the creditor hence the petition is invalid and a nullity. Further, it transpired, but only during the hearing of the appeal, that the signatures of the agent appearing in the creditor's petition, the affidavit of truth of statement and the creditor's affidavit in reply to the debtor's affidavit differ one from the others.

Held, allowing the debtor's appeal:

Any officer presenting a creditor's petition on behalf of a corporation has to be duly authorized under seal. Provided that the seal of the corporation is affixed to the authorization, a board resolution granting authorization need not be under seal. In this case, the creditor had not shown that Chong Che Chong who presented the creditor's petition on behalf of the creditor, a corporation, had been duly authorized under seal to do so at the material time (see p 290F–G). Moreover, the patent discrepancies in the signatures appearing on the various documents purportedly signed by the agent could not be explained by the creditor at the hearing of the appeal (see p 291A–B).

A Therefore, the creditor's petition is null and void as the agent was not authorized under seal and it cannot be said with certainty that he did present the petition nor depose the affidavit of truth of statement (see p 291C).

B **[Bahasa Malaysia summary**

Suatu petisyen pemiutang telah diambil terhadap perayu penghutang ('penghutang') oleh responden pemiutang ('pemiutang'), yang merupakan sebuah perbadanan. Petisyen tersebut telah diserahkan oleh seorang Chong Che Chong ('ejen tersebut'), seorang pengarah syarikat
C pemiutang, yang dilantik untuk mewakili pemiutang melalui suatu ketetapan lembaga pengarah-pengarah. Pada pendengaran petisyen tersebut, perintah-perintah penerimaan dan penghukuman telah diberi terhadap penghutang atas mana ia telah membuat permohonan untuk mengetepikan kedua-duanya. Permohonan tersebut telah ditolak oleh pendaftar dan penghutang merayu kepada hakim dalam kamar.

D Permohonan untuk pengetepikan adalah berdasarkan hujah bahawa, bertentangan dengan peruntukan-peruntukan s 133(a) Akta Kebankrapan 1967 dan k 215 Kaedah-Kaedah Kebankrapan 1969 ('kaedah-kaedah tersebut'), ejen tersebut telah tidak diberikuasa di bawah meterai untuk mengemukakan petisyen bagi pihak pemiutang.
E Justeru itu, petisyen tersebut adalah tak sah dan batal. Lagipun, adalah diketahui, tetapi hanya pada masa pendengaran rayuan, bahawa tandatangan-tandatangan ejen yang tertera pada petisyen pemiutang, afidavit mengenai kebenaran pernyataan dan afidavit jawapan pemiutang terhadap afidavit penghutang, adalah berbeza satu dari yang lain.

F **Diputuskan**, membenarkan rayuan penghutang:

Mana-mana pegawai yang mengemukakan petisyen pemiutang bagi pihak suatu perbadanan mestilah diberikuasa di bawah meterai. Selagi meterai perbadanan tersebut dilekatkan dengan kebenaran, ketetapan lembaga pengarah yang memberikan kebenaran tersebut tidak
G perlu diberi di bawah meterai. Di dalam kes ini, pemiutang tidak menunjukkan bahawa Chong Che Chong yang mengemukakan petisyen pemiutang tersebut bagi pihak pemiutang, sebuah perbadanan, telah diberikuasa di bawah meterai untuk berbuat demikian pada masa-masa yang berkenaan (lihat ms 290F–G).
H Lagipun, perbezaan-perbezaan ketara yang timbul dalam tandatangan-tandatangan atas pelbagai dokumen-dokumen yang dikatakan ditandatangani oleh ejen tersebut tidak dapat dijelaskan oleh pemiutang pada pendengaran rayuan (lihat ms 291A–B).

Maka, petisyen pemiutang adalah dengan itu batal dan tak sah memandangkan bahawa ejen tersebut tidak diberikuasa di bawah
I meterai dan tidak boleh dikatakan dengan pasti bahawa beliau telah menyerah petisyen mahupun mendepos afidavit mengenai kebenaran pernyataan tersebut (lihat ms 291C).]

Notes

For cases on creditor's petition generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1626–1635.

Cases referred to

Mat Shah bin Safuan, Re; ex p United Asian Bank Bhd [1991] 2 MLJ 48 (refd)

Midgley, Re (1913) 108 LT 45 (refd)

Samuel Pakianathan a/l Jabamanickam, Re; ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 (refd)

Yong Tet Yin,Re; ex p United Overseas Bank Ltd [1995] 4 MLJ 582 (refd)

Legislation referred to

Bankruptcy Act 1967 s 133

Bankruptcy Rules 1969 r 215

Saranjit Singh (*Devinder Singh* with him) (*Isherafer Ali Devinder & Associates*) for the appellant.

Jeffrey Wong (*Rajesh Jethi* with him) (*Raja Darryl & Loh*) for the respondent.

Steve Shim J: This is an appeal by the judgment debtor ('JD') against the decision of the learned SAR given on 5 July 1998 dismissing with cost his application to set aside the receiving order and adjudication order dated 21 April 1998 granted pursuant to a creditor's petition taken out by the judgment creditor ('JC') against the JD. The application of the JD in encl 18 is in effect an application to rescind and annul the said receiving order and the adjudication order.

The main thrust of his application is contained in paras 4 and 5 of his affidavit in encl 17 which state:

> (4) Saya dinasihati oleh peguamcara saya bahawa perintah-perintah tersebut adalah cacat dan defektif oleh kerana En Chong Che Chong No K/P 530216-10-5679) tidak mempunyai autoriti yang sah di bawah Undang-Undang untuk mempetisyen mahkamah yang mulia ini untuk membuat satu perintah penerimaan dan perintah penghukuman terhadap saya.
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> (5) Justeru, autoriti yang kononnya dipunyai En Chong Che Chong adalah mencurigakan dan tidak boleh dijadikan asas untuk memfailkan petisyen pemiutang.

Quite obviously, the averments contain a concentrated attack on the authority of En Chong Che Chong in presenting the creditor's petition. It is contended that he had no legal authority to present the said creditor's petition on behalf of the JC (a corporation) and as such, the receiving order and adjudication order granted by the learned SAR are null and void. The judgment creditor (JC) contends otherwise.

A In my view, the central issue in dispute relates to the construction to be placed on s 133(a) of the Bankruptcy Act 1967 and r 215 of the Bankruptcy Rules 1969 upon the facts of the present case. Section 133(a) stipulates:

> For all or any of the purposes of this Act —
>
> (a) a corporation may act by any of its officers authorized in that behalf under
B the seal of the corporation ... .

And r 215 states:

> Where a corporation presents a petition or takes any other action under this Act, the officer of the corporation may act in his name, stating that he is such officer duly authorized under seal; but a petition may be presented by the
C corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an 'officer' within section 133, and if duly authorized under seal can act for the corporation.

Counsel for the JC has submitted that r 215 comprises of three limbs and that in respect of the second limb which states that a petition may be
D presented by a corporation and signed by an officer on its behalf, there are authorities to support the contention that there is no necessity to have any authorization under seal. He cites two cases, namely, *Re Yong Tet Yin; ex p United Overseas Bank Ltd* [1995] 4 MLJ 582 and *Re Mat Shah bin Safuan; ex p United Asian Bank Bhd* [1991] 2 MLJ 48.

E It is contended that the present case comes within the ambit of the second limb in r 215 and that there is sufficient authorization given to one En Chong Che Chong, a director, to present the creditor' six petition on behalf of the JC (a corporation). Reference is made to the corporation's board resolution exhibited as 'CCC-1' in encl 21, the relevant part of which states:

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> That the director of the company Mr Chong Che Chong be and is hereby authorized to act and to sign for and on behalf of the company for all or any of the purposes in respect of legal proceedings taken by the company.

The said resolution was apparently signed by the board of directors of the JC including En Chong Che Chong. Reliance is also placed on the affidavit
G of truth of statement filed in support of the creditor's petition wherein En Chong Che Chong had deposed that he was a director of the JC and was duly authorized to make the affidavit and to present the said creditor's petition.

As I have said, the JD has taken a different position. Counsel for the JD
H has raised two grounds, First, he submits that the creditor's petition presented by En Chong Che Chong as agent and on behalf of the JC was not authorized under the seal of the JC a corporation. There is nothing in the creditor's petition or in the affidavit of truth of statement, to indicate clearly 'that there was an authorization under seal given by the JC. Here, he relies on the case of *Samuel Pakianathan all Jabamanickam, Re; ex p Perwira*
I *Habib Bank Malaysia Bhd* [1997] 5 MLJ 737, where it was held that in the instances arising from r 215, whether the creditor's petition was presented in its name or in the name of an officer on its behalf, the officer concerned

must be duly authorized under seal and s 133 had the effect of over-riding any ambiguity that might arise under r 215. In that case, it was found that the words 'under seal' were missing in the creditor's petition and there was no evidence presented to the court that the relevant officers had been authorized under seal. On that basis, amongst others, the court allowed the appeal against the decision of the learned SAR in dismissing the appellant's application to set aside the creditor's petition with costs. This appears to be similar to the position in the instant case. Hence, counsel for the JD has submitted that the creditor's petition presented by En Chong Che Chong on behalf of the JC, not being authorized under seal, is invalid and a nullity.

Counsel for the JC has, as I have said, responded by citing the two cases, namely, *Re Yong Tet Yin* and *Re Mat Shah bin Safuan*. It is significant to note at the outset that the facts in those cases are quite different from our case. In both those cases, the officer alleged to have presented the creditor's petition on behalf of the JC (a corporation) was a manager who was also conferred a power of attorney to act on all matters arising out of the bankruptcy of any person indebted to the JC. In the instant case, En Chong Che Chong who was authorized to present the creditor's petition on behalf of the JC was merely a director thereof and nothing more. Quite clearly, therefore the cases cited by counsel for the JC are distinguishable on facts with the case before us. In the circumstances, they cannot be of much assistance.

In any event, I am more inclined to accept the construction adopted by the court in *Re Samuel Pakianathan*. In my view, r 215 has to be read with s 133 of the Bankruptcy Act. Reading the second limb in r 215 with s 133, it would seem clear that any officer presenting a creditor's petition on behalf of a corporation has to be duly authorized under seal. In the case of a corporation presenting a creditor's petition by an officer authorized in that behalf, there is no necessity for a board resolution granting the authorization to be under seal provided that the seal of the corporation is affixed to the authorization: see *Re Midgley* (1913) 108 LT 45.

Having regard to the views I take, I am bound to hold that the JC has not shown that En Chong Che Chong who presented the creditor's petition on behalf of the JC, a corporation, had been duly authorized under seal to do so at the material time. Neither the creditor's petition nor the affidavit of truth of statement deposed by En Chong Che Chong give any indication that there was an authorization under seal. In the circumstances, and for the reasons stated, I find there is substance in the first ground advanced by the JD.

The second ground canvassed by counsel for the JD appears to have emerged unexpectedly in the course of his submission. This relates to the authenticity of the affidavit of truth of statement deposed by En Chong Che Chong in support of the creditor's petition filed by him on behalf of the JC. Counsel has cast doubt as to whether the said affidavit was actually deposed or affirmed by En Chong Che Chong in view of the signature therein which differs substantially from his signatures made in the other documents such

as the affidavit in reply allegedly affirmed by him on 5 June 1998 (encl 21) as well as the board resolution exh 'CCC-1'. when one compares those signatures, the differences are obvious even to a non hand-writing expert. The signatures in the creditor's petition and the affidavit of truth of statement are obviously different from the signature in the affidavit-in-reply. All these signatures are purportedly made by En Chong Che Chong, a director of the JC. Counsel for the JC has said that there should be a logical explanation for this but he offers no explanation whatsoever. It seems that he has been caught by surprise. Be that as it may, the position is that the JC has not been able to establish in any satisfactory manner that the creditor's petition was actually signed by En Chong Che Chong or that the affidavit of truth of statement filed in support thereof was affirmed by him. In the circumstances, it cannot be said with any reasonable certainty that the said creditor's petition was in fact presented by En Chong Che Chong on behalf of the JC and/or that the affidavit of truth of statement was deposed by him at the material time. This doubt must therefore militate against the stand taken by the JC.

For the reasons given, I hold that there is merit in the JD's application in encl 18. In the circumstances, I will allow the appeal with cost to be taxed unless otherwise agreed.

Debtor's appeal allowed.

Reported by Chris Lin